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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASIA AWAD, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, RAAD KHALAF, and DOES 1 - 30, Inclusive Defendants.	CASE NO. 08-CV-00696-JM-AJB **PLAINTIFF'S OPPOSITION** TO DEFENDANT RAAD KHALAF'S MOTION TO DISMISS AND PLAINTIFF'S **REQUEST FOR REMAND** Date: June 6, 2008 Time: 1:30 p.m. Crtrm: 16 - Hon. Jeffrey Miller

SUMMARY OF ARGUMENT

Defendant's argument is that, as a "matter of law," an insurance agent never can be sued for acts or injuries his client sustains. Defendant's argument is based solely on cases where the agent is a captive agent working solely on behalf of the insurer. These arguments do not apply where the agent is acting or failing to act on behalf of the insured/customer, or where the agent is a dual agent and breaches his duties to the customer. Mr. Khalaf was at all times acting as Mrs. Awad's agent, which makes defendant's removal and argument erroneous. Defendants, as the moving party, bear the burden of showing that (1) no legal claim can be stated against defendant Khalaf and (2) that Khalaf was not acting as an agent for Mrs. Awad. Defendants' motions have not met either burden. Neither defendant has even offered a declaration that Khalaf was an employee or captive agent of Liberty Mutual Fire Insurance Company.

I.

INTRODUCTION

Defendant Raad Khalaf is a named defendant in only the Third Cause of Action For Negligence. The allegations of this cause of action allege without contradiction that Khalaf "agreed to represent and assist plaintiff" and "act as her agent in obtaining and applying for insurance coverages." (Complaint ¶16.) In ¶17 plaintiff alleges that: "In reliance upon defendant's status as her agent" plaintiff requested Khalaf's assistance in obtaining insurance coverage in adding a rider to her policy insuring a substantial amount of jewelry. He obtained the rider, there is no allegation that Khalaf failed to procure coverage, nor is there any allegation that he acted as an employee of Liberty Mutual. The complaint only alleges that he engaged in acts that were detrimental to his principal, Mrs. Awad, a fact that is not disputed.

Paragraph 18 alleges that Khalaf engaged in acts that were negligent toward his principal, Mrs. Awad and that his acts needlessly caused her injury. These facts, accepted as true for purposes of this motion, show that Mr. Khalaf acted against his principal (Mrs. Awad) had secret conversations in application process about Mrs. Awad that were "against plaintiff's interests" by telling Liberty Mutual that "plaintiff didn't have any of the jewelry she was insuring and that the jewelry was stolen at some earlier date." More importantly, Khalaf, as plaintiff's agent, did not advise plaintiff that he had any concerns about plaintiff or her jewelry or that she should provide proof of the jewelry's existence, bring the jewelry to him for inspection or get another agent to represent her interests. His actions were in conflict with his representation of her, and more importantly his acts/omission caused her claim to be denied wrongfully. Contrary to defendant's assertions, an agent does not have the right to cause his principal to suffer a loss that the agent could have prevented.

The complaint is clear that Khalaf is alleged to be Mrs. Awad's agent. Defendant's motion is based entirely on cases and law that deal with circumstances where the agent was acting solely as an agent for the insurance company in selling an insurance policy. Those same cases also make it clear that where an agent is a "dual agent" a claim can be stated against the agent, as well as the insurance company. Mr. Khalaf is only alleged to have acted as Mrs. Awad's agent, not Liberty

Mutual's agent. The operative claim/allegations are in the negligence cause of action where Khalaf is named as a defendant.

II.

THE BURDEN OF ESTABLISHING PROPER REMOVAL RESTS ON DEFENDANT.

Liberty Mutual Fire (LMF) removed this action even though diversity of citizenship does not exist. Defendant Khalaf now joins in a motion to dismiss Khalaf. The provisions of 28 USC §1332 are to be strictly construed against removal and any doubt is resolved in favor of remand. Duncan v. Stuetzle, 76 F.3d 1480 (9th Cir. 1996). The burden of establishing jurisdiction rests with LMF, the party effecting the removal. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988).

Further, the "presumptions" on a motion to dismiss a party on the basis of fraudulent joinder are against such a finding. See, Diaz v. Allstate, 185 F.R.D. 581, 586 (C.D. Cal. 1998) and Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983).

Defendants LMF and Khalaf must prove that there is absolutely no possibility that plaintiff will be able to establish a viable cause of action against the non-diverse defendant in state court. See, Kruso v. Int. Telephone & Telegraph, 872 F.2d 1416, 1426 (9th Cir. 1989). This court is not asked to determine if plaintiff will prevail or even whether plaintiff will probably prevail. The only question is whether there is a "possibility" that she might be able to state a claim against defendant Khalaf. See, Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992).

III.

PLAINTIFF'S NEGLIGENCE CLAIM AGAINST HER AGENT IS VIABLE.

Defendant's motion to dismiss for fraudulent joinder is based entirely on cases where the agent was a captive agent of the insurance and/or was the company's agent or employee. In Mercado v. Allstate, 340 F.3d 824 (9th Cir. 2003) the plaintiff sued Allstate and Silva Luevano, an Allstate employee (Id. p. 825). The court upheld the dismissal of Luevano based on the allegations that all "pertain to actions she took in her capacity as an Allstate employee." 340 F.3d at 826. The Mercado decision made careful note that a different result would issue if the employee acts as a "dual agent:"

> All of Mercado's allegations against Luevano pertain to actions she took in her capacity as an Allstate employee. It is well established that, unless an agent or employee acts as a dual agent (a circumstance not present in this case), she cannot be held individually liable as a defendant unless she acts for her own personal advantage.
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> An employee acts as a "dual agent" by assuming special duties for the benefit of the insured beyond those required by her principal. See Jones v. Grewe, 189 Cal.App.3d 950, 954-55, 234 Cal.Rptr. 717 (1987). Because Luevano did not take on any additional duties for the benefit of Mercado, she was not a dual agent. See, e.g., *Charlin v. Allstate Ins. Co.,* 19 F.Supp.2d 1137, 1140 - 41 (C.D. Cal. 1998) (concluding joinder of an agent was fraudulent because plaintiff failed to establish he was a "dual agent" by acting beyond his capacity for the insurer).
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> (Emphasis added.)

Defendant's motion presents no evidence that Khalaf was an "employee" of LMF and no evidence is offered to show that he was not acting as Mrs. Awad's agent or a dual agent. Defendant simply ignores the allegations that Mr. Khalaf was Mrs. Awad's agent, an allegation that must be accepted as true for purposes of this motion. The "possibility" of an agent/principal relationship takes this case outside the arguments and cases defendants rely upon - "employees" Mercado v. Allstate and "agent" for the company Good v. Prudential, 5 F.Supp. 804 (9th Cir. N.D. Cal. 1998). Good also made it clear that the insurance agent could be sued where he acted in a "dual agent" capacity. 5 F.Supp. at 807. The Good decision also noted that there was no issue of "dual agent" because there was no allegation suggesting it in the complaint:

> Mr. Good asserts that the complaint contains allegations that, if proven, establish that Ms. Magid acted as a dual agent. The only such allegation he cites, however, states simply that Defendants had superior knowledge of their insurance products and led him to believe he was acting in his best interests. Complaint at ¶17. Under California law, a "dual agent" theory requires that the insurance agent act on behalf of the insured in some way beyond his or her capacity as an agent for the insurer. An insurance agent cannot be a "dual agent" unless he or she is either an independent broker or has a long-term, special relationship with the insured. *Maloney v. Rhode Island Ins. Co.,* 115 Cal.App.2d 238, 251 P.2d 1027 (1953). Nothing in the complaint indicates that Ms. Magid was an independent broker or that she had a long-term relationship with Mr. Good. Furthermore, Mr. Good alleges that "each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency." Complaint at ¶6. The Court finds, therefore, that Mr. Good has presented no evidence or allegation indicating that Ms. Magid was acting as a dual agent.
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> (Emphasis added.)
> Good at 808.

Here, the facts are just the opposite. It is alleged that Mr. Khalaf was acting as "plaintiff's agent" (¶16) and that plaintiff relied upon "defendant's status as her agent" (¶17) and that defendant Khalaf "failed to advise, counsel and protect plaintiff's interests and breached his fiduciary duties to plaintiff" (¶20) by failing to advise plaintiff that Khalaf, as her agent, questioned her possession of the jewelry he was supposed to get insurance for and failed to give her the opportunity to resolve any such concerns by failing to ask her to bring the jewelry to him to resolve the issue or at least tell her that he was reporting these concerns to LMF. His negligence denied plaintiff the chance to resolve this issue before the jewelry was stolen in a burglary of her home and planted the seeds of doubt that caused the claim to be denied.

The allegations in the Third Cause of Action pertain to Khalaf's actions as Mrs. Awad's agent, or at least as a "dual agent." It is not alleged that he was an employee of Liberty Mutual. As an agent to Mrs. Awad, he owed her a duty of loyalty and care. He breached those duties by failing to disclose to her his concerns about the insured items and his secret conversations that were not disclosed to plaintiff until after the loss, when it was impossible to correct his actions.

Defendant has failed to bring to this court's attention other cases which hold that a claim for negligence can be stated against an insurance agent. See, Macey v. Allstate, 200 F.Supp.2d 1116 (N.D. Cal. 2002). In McNeill v. State Farm, 116 Cal.App.4th 597, 603 (2004) the court rejected the argument that an insurance agent could not be sued along with the insurer:

> Defendants finally contend that the action was properly dismissed with respect to Cannon, because only an insurer, not its agent, may liable to the insured on account of the agent's acts within the disclosed scope of employment. The authorities defendants cite reflect that this rule applies to cases involving failure to procure insurance coverage as requested or agreed upon. (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 378-379, 381 - 382, 50 Cal.Rptr. 478; *Gasnik v. State Farm Ins. Co.* (E.D. Cal. 1992) 825 F.Supp. 245, 248 - 249.) But the present cause of action charges intentional misrepresentation, or fraud. Like other agents, an insurance company's may be personally responsible when they commit that tort. (2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, §149, pp. 144 - 145; 1 Croskey et al., Cal. Practice Guide: Insurance Litigation (Rutter 2003) § 2:54, p. 2 - 14.3; cf. Ins. Code, §780.) We disagree with the contrary view of *Good v. Prudential Ins. Co. Of America* (N.D.Cal. 1998) 5 F.Supp.2d 804, 807. Moreover, the present complaint's indication of a long-term relationship between Cannon and plaintiff supports an exception to *Good* by its own terms. (*Id.* at p. 808; cf. *Macey v. Allstate Property and Cas. Ins. Co.* (N.D. Cal. 2002) 220 F.Supp.2d 1116.)
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> (Emphasis added.)

Clearly, California state law allows an agent to be sued for ordinary torts including negligence. Similarly, Mr. Khalaf is not being sued for a failure to obtain the requested insurance, he is being sued for actions that breached his obligations to act in plaintiff's best interests, as her agent, as well as acts which caused her injury that could have been avoided if he had reasonably advised her of his concerns.

In Quiroz v. Valley Forge Insurance 2005 WL 1806366 (N.D.Cal.), the court rejected the fraudulent joinder argument where the complaint raised the mere potential for dual agent liability or the special duty exception:

> It is generally true in California that an agent, when acting in the name of a disclosed principal, is not personally liable for negligence committed within the scope of his or her employment. *See Lippert,* 241 Cal.App.2d at 382, 50 Cal.Rptr. 478. However, as Quiroz has correctly noted, California courts have recognized two separate "lines of exception" to the general *Lippert* rule: (1) the dual agency exception and (2) the "special duty" exception. See, *Macey v. Allstate Property and Casualty Insurance Co.*, 220 F.Supp.2d 1116, 1120 (N.D.Cal.2002). Since Valley Forge is the removing party, it bears a heavy burden of conclusively establishing that neither exception applies here.

Similarly, Khalaf's moving papers do not negate the "dual agent" exception, the special duty exception nor the allegations that Khalaf was acting solely as plaintiff's agent. Defendant's motion is based entirely on the legal argument that no claim can be stated if Mr. Khalaf was acting solely as an agent or employee of LMF. The law is clear that such a claim can be made on the dual agent theory and the complaint raises this possibility as well as the possibility that Mr. Khalaf was acting solely as plaintiff's agent. Defendants have not negated either theory and as such, the motion should be denied.

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IV.

CONCLUSION.

Defendant Khalaf's Motion to Dismiss is not well taken and should be denied. Defendant has failed to establish that no right to relief is available against Mr. Khalaf under California law. Accordingly, plaintiff asks that defendant's motion be denied and that the case be remanded to the state court based on the absence of complete diversity of citizenship.

DATED: May 21, 2008 LEVINE, STEINBERG, MILLER & HUVER

By: /s/ Harris Steinberg
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